Washington Law Review

Volume 60 | Number 2

4-1-1985

Civil RICO and the Prior Criminal Conviction Requirement: Has the Second Circuit Drawn the Net Too Tightly?—Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), cert. granted, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648)

Diana K. Carey

CIVIL RICO AND THE PRIOR CRIMINAL CONVICTION REQUIREMENT: HAS THE SECOND CIRCUIT DRAWN THE NET TOO TIGHTLY?—*Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648).

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] to halt organized crime's infiltration of the American economy. Congress created "enhanced sanctions and new remedies"[2] against defendants who engage in racketeering activity to operate or gain control of business enterprises. One new remedy was "civil RICO," which authorizes anyone "injured in his business or property" to recover treble damages and attorneys' fees if this injury results from a violation of the act.[3]

In recent years the number of private civil RICO cases has escalated dramatically,[4] prompting federal courts to seek reasoned limits on civil RICO to prevent its misapplication. In *Sedima, S.P.R.L. v. Imrex Co.*,[5] the Second Circuit Court of Appeals added its effort to limit the civil RICO "net."[6] The court ruled that private civil RICO suits may only be brought

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (codified at 18 U.S.C. §§ 1961–68 (1982)).

2. *Id.*, 84 Stat. at 923 (Statement of Findings and Purpose).

3. 18 U.S.C. § 1964(c) (1982). The statute also authorizes the government to seek criminal penalties and civil remedies. Criminal sanctions include fines up to $25,000, imprisonment for up to 20 years, and forfeiture of interests wrongfully acquired or maintained. *Id.* § 1963. The Attorney General's civil remedies include divestiture of the violator's business interests, dissolution of the enterprise, and injunctions against future participation in similar businesses. *Id.* § 1964(a), (b), (d).

4. The increase in number of suits under civil RICO has been called a "virtual deluge," Skinner & Tone, *Civil RICO and the Corporate Defendant*, Nat'l L.J., Jan. 30, 1984, at 22, and an "explosion," Miller & Olson, *The Expanding Uses of Civil RICO*, CAL. LAW., June 1984, at 12. Because of the increasing popularity of the provision, one article called it "everybody's darling." Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982). See *infra* note 23 for statistics on the number of cases.

For a recent bibliography on RICO, see *Selected Materials on the Racketeer Influenced and Corrupt Organizations Act (RICO)*, 39 REC. A.B. CITY N.Y. 436 (1984).

5. 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648). *Sedima* was one of a trio of civil RICO decisions issued on successive days. In the second decision, Bankers Trust Co. v. Rhoades, 741 F.2d 511, 517 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657), a different Second Circuit panel affirmed the dismissal of a bankruptcy fraud case after concluding that the plaintiff had not proven any distinct injury due to a pattern of racketeering. In the third RICO decision, Furman v. Cirrito, 741 F.2d 524, 525 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604), a third panel concluded that neither RICO's language nor its legislative history imposed a racketeering injury requirement on plaintiffs, but, based on the *Sedima* and *Bankers Trust* opinions, felt compelled to affirm the district court's dismissal of a RICO claim. The *Furman* panel indicated that an attempt to have the Second Circuit hear all three en banc failed. *Id.* Judge Cardamone filed dissenting opinions in both *Sedima* and *Bankers Trust* and was a majority member of the *Furman* panel.

6. Numerous authorities characterize RICO as a "net." *See, e.g.*, Sutliff, Inc. v. Donovan Cos.,

after the defendant has been criminally convicted for the acts alleged in the suit.[7] The court also held that RICO plaintiffs must demonstrate a "racketeering injury" in addition to the injury caused by the alleged acts.[8]

This Note analyzes the Second Circuit's decision[9] in *Sedima* against the background of the explosion of civil RICO suits and judicial attempts to contain that explosion. It concludes that courts should reject the prior criminal conviction requirement. The requirement is unsupported by either the language or the legislative history of the act, and in practice the requirement would frustrate legislative purposes and deny recovery to those victims whom Congress intended the act should compensate. Moreover, the requirement nullifies the purpose of the private attorney general concept. Until Congress acts to redefine the statute, other limitations would create more desirable results than those produced by requiring a prior criminal conviction.

I. BACKGROUND

A. *The Structure of RICO*

RICO was part of the Organized Crime Control Act of 1970, which Congress passed in its quest for new and more effective measures to combat organized crime's ability to escape traditional sanctions.[10] One of these measures was a provision for a private right of action arising out of a RICO violation.[11] The private cause of action was added as a House amendment to the original Senate bill and received little debate on the floor of either the

727 F.2d 648, 654 (7th Cir. 1984); United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

7. 741 F.2d at 496.

8. *Id.* at 494.

9. No other circuit has adopted the prior criminal conviction requirement, and few courts or commentators have addressed whether the statute requires prior criminal convictions. In contrast, numerous courts and commentators have addressed the racketeering injury requirement. *See infra* notes 47–54 and accompanying text.

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

Congress rejected as unworkable and possibly unconstitutional a statute based on affiliation with organized crime. *See* 116 CONG. REC. 35,346 (1970) (rejecting an amendment proposed by Representative Biaggi that would have specifically criminalized membership in the Mafia or La Cosa Nostra). Instead, Congress concentrated on the types of offenses that it considered to be characteristic of organized crime. For example, Senator McClellan, one of the sponsors of the bill, commented that "the Senate Report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that those offenses are characteristic of organized crime." McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 142 (1970).

11. 18 U.S.C. § 1964(c) (1982).

Senate or the House.[12] Statements in support of the act, however, indicate that the private remedy was patterned after the antitrust provisions in section 4 of the Clayton Act.[13]

The civil provisions of RICO, section 1964(c), provide:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962 proscribes three separate activities. First, RICO makes it unlawful to use or invest any income derived from a "pattern of racketeering activity" in the acquisition, establishment, or operation of any enterprise engaged in or affecting interstate or foreign commerce.[14] Second, RICO prohibits acquiring or maintaining an interest in such an enterprise through a "pattern of racketeering activity"[15] or conducting or participating in such an enterprise's activities through a "pattern of racketeering activity."[16] Third, the statute makes it unlawful to conspire to violate any of these provisions.[17]

Section 1961 provides statutory definitions for the key terms of section 1962. "Racketeering activity" is defined to include a number of state and federal offenses, known as "predicate offenses."[18] A "pattern of racketeer-

12. The Second Circuit observed that the civil provision was proposed in the middle of the second and last day of House discussion of the bill and that only three remarks were made regarding this amendment. *Sedima*, 741 F.2d at 490. The Senate accepted the House amendment without a conference. *Id.* at 489. In addition to the extensive review of legislative history in *Sedima*, *id.* at 488–92, refer also to Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249–80 (1982). *See generally Organized Crime Control: Hearings on S. 30, and Related Proposals Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *House Hearings*].

13. Representative Steiger and the American Bar Association (ABA) both proposed amending title IX to add a civil RICO provision. Representative Steiger suggested the amendment to "make applicable those provisions granting anti-trust type remedies to deal with organized crime, the parallel private anti-trust type remedies available now to private persons under the anti-trust law." *House Hearings*, *supra* note 12, at 520 (proposal of Rep. Steiger). The ABA statement recommended "the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." *Id.* at 543–44 (statement of Edward L. Wright, ABA president-elect). The ABA had previously gone on record as endorsing the use of antitrust and other "appropriate civil weaponry into the anti-crime arsenal, particularly against organized crime." *Id.* at 544. Congressman Poff later commented that RICO's private cause of action was "another example of the antitrust remedy being adapted for use against organized criminality." 116 CONG. REC. 35,295 (1970).

14. 18 U.S.C. § 1962(a) (1982).

15. *Id.* § 1962(b).

16. *Id.* § 1962(c).

17. *Id.* § 1962(d).

18. *Id.* § 1961(1). State offenses are included in subsection (A) by generic designation; these involve acts or threats chargeable under state law and punishable by imprisonment for more than one

ing activity" is defined as the commission of at least two acts of racketeering activity within a ten-year period.[19] An "enterprise" is broadly defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[20] Finally, Congress provided that the act shall be "liberally construed to effectuate its remedial purposes."[21]

B. The Civil RICO "Explosion"

There were few civil cases in the first decade after Congress enacted the statute, but in recent years the private damages provision has gone from relative obscurity to virtual notoriety.[22] There are several reasons for this "explosion"[23] of cases. On its face the RICO statute is very broad—not only does it encompass a wide variety of predicate offenses, but those such as mail and wire fraud are themselves broad.[24] In addition, the provision for

---

year. Federal offenses included under subsections (B) and (C) are those listed as indictable by specific reference to the United States Code, including mail fraud, wire fraud, and certain labor acts, plus, by general reference under subsection (D), "any offense involving . . . fraud in the sale of securities" or certain drug-related activities, punishable under any law of the United States.

19. *Id.* § 1961(5).

20. *Id.* § 1961(4).

21. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947.

22. Most of the civil RICO case law is contained in federal district court opinions, the majority of which reflect pre-judgment decisions on motions such as change of venue, class certification, or motions for dismissal. In 1984 it was reported that only one RICO suit had gone to judgment. Comment, *Civil RICO: Pleading Fraud for Treble Damages,* 45 MONT. L. REV. 87, 89 n.14 (1984) (referring to B.F. Hirsch, Inc. v. Enright Refining Co., 577 F. Supp. 339 (D.N.J. 1983)).

23. Estimates vary on the number of civil RICO suits. One newspaper article reported that there are now over 100 published opinions. Siegel, *'RICO' Running Amok in Board Rooms,* L.A. Times, Feb. 15, 1984, § I, at 1, col. 4. Another author reported that more than 250 RICO civil lawsuits have been filed in the last few years. Nathan, *Civil RICO (Part I),* 29 PRAC. LAW. 11, 12 (1983).

The author of this Note reviewed 192 published decisions. The following illustrates the pattern of increase:

1970–79	8 reported cases
1980	5
1981	16
1982	33
1983	63
1984	67
	192

Latest reported decision reviewed was Dec. 14, 1984. If there was more than one decision on a case, only the highest level or most recent was counted. Of these, 29 were appellate and 163 were district court decisions. The Second Circuit, with 56 district court and 7 appellate court opinions, had the most reported decisions. Research of author Dec. 1984 (notes on file with the *Washington Law Review*).

See also infra notes 29, 31 & 40.

24. *See supra* note 18. Cases construing mail fraud apply to wire fraud. *E.g.*, United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977). To constitute an indictable offense under these statutes, there must be a scheme designed to defraud or to obtain money or property by false pretenses, and the

treble damages plus attorneys' fees provides an incentive to sue. Other factors include the liberal construction provision,[25] ease of proof,[26] and broad discovery encompassing at least the statutory ten-year period for patterns of activity.[27] RICO also contains liberal venue and process provisions.[28] Attorneys today often include a RICO claim with other claims or assert it as a counterclaim.[29] Some even suggest that not asserting a RICO claim may constitute negligence.[30]

Because many of the predicate offenses such as mail and wire fraud, securities fraud, or bribery may easily encompass business transactions, RICO has frequently been used against many kinds of "garden variety"

use of the mails or interstate wires, including interstate telephone calls, in furtherance of the fraudulent scheme. 18 U.S.C. §§ 1341, 1343 (1982). "Scheme to defraud" has not been limited to common law notions of fraud or false pretenses, but has been broadly applied in such areas as commercial bribery, intangible rights, and breaches of fiduciary relationships. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1353 (4th Cir.) (scheme to defraud the public of its right to the governor's "loyal and honest" services), *aff'd in relevant part on reh'g en banc*, 602 F.2d 653 (4th Cir. 1979) (per curiam), *cert. denied*, 445 U.S. 961 (1980).

Commentators have expressed concern with federal courts' willingness to consistently expand the borders of the mail and wire fraud statutes. *See, e.g.*, Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of A White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983).

Courts have criticized the use of mail and wire fraud as underlying predicate acts in civil RICO cases, because it was clearly established when RICO was enacted that there is no private right of action for violations of these statutes. *See, e.g.*, Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984).

25. *See supra* note 21 and accompanying text.

26. First, the burden of proof in a civil suit has generally been held to be preponderance of the evidence, rather than the reasonable doubt standard used in criminal suits. *See infra* note 92 and accompanying text.

Second, it may be easier to prove a RICO claim than other types of claims. RICO's attractiveness in antitrust cases, for example, results from the fact that a RICO claim may survive in some cases in which an antitrust claim cannot. Miller & Olson, *supra* note 4, at 12. An antitrust claim would be difficult to assert if a business were injured by predatory practices of a principal competitor, and the predator was acting unilaterally and did not have the realistic prospect of gaining a monopoly. But if the scheme had been carried out through the mails, the plaintiff might well assert a RICO claim using the mail fraud statute. Miller & Olson note that "the plaintiff might be better off under RICO because no proof would be necessary on market share, relevant market, or other complex antitrust issues." *Id.* at 12–13.

27. 18 U.S.C. § 1961(5) (1982).

28. For example, venue may be had in any district where the defendant "resides, is found, has an agent, or transacts his affairs." *Id.* § 1965(a). Nationwide venue and service of process is provided if required by the "ends of justice." *Id.* § 1965(b). Subpoenas can be served outside the district of venue and beyond the 100 mile limit upon a showing of good cause. *Id.* § 1965(c).

29. A RICO claim is seldom brought by itself. Of the 192 cases reviewed, *see supra* note 23, 80% also had state and/or federal claims in the same or related action, or requested the addition of a RICO claim to an existing state or federal action; 68% had related state claims, including two with state RICO claims; and 55% had other federal claims, over three-fourths of which were alleged violations of federal securities or antitrust laws, in the same suit. In 20% of the 192 cases, there was either no other action or it was not possible to determine this from the published decision. Defendants asserted RICO counterclaims in four cases.

30. *See, e.g.*, Siegel, *supra* note 23, at 21 (quoting a private attorney, "It's almost malpractice if I don't use [civil RICO].").

fraud.[31] The roster of civil RICO defendants includes such diverse entities as county governments,[32] unions,[33] stockbrokers,[34] retirement homes,[35] law firms,[36] insurance companies,[37] public utilities,[38] and banks.[39] For many of these defendants, the racketeering label is especially damaging.

C. *Judicial Limitations on Civil RICO*

The judiciary is becoming increasingly hostile toward the growing use of civil RICO. A number of courts have expressed concern that the statute, rather than being used to attack organized crime,[40] is being used to federalize traditionally state matters.[41] Judges denounce the inherent lack of prosecutorial restraint in private civil actions,[42] and criticize the collat-

31. Of the 192 cases reviewed by this author, *see supra* note 23, it was possible to determine the underlying predicate acts in 127 cases. Of these, 87% or 111 cases alleged one or more forms of fraud: 95 of these alleged mail or wire fraud, 41 alleged securities fraud, and 3 alleged bankruptcy fraud. For discussion of civil RICO's application to business fraud, see Note, *Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 ST. JOHN'S L. REV. 93 (1983); Comment, *Liability for General Business Fraud: Putting A Contract Out On RICO Treble Damages*, 45 U. PITT. L. REV. 481 (1984).

32. Cullen v. Margiotta, 618 F.2d 226 (2d Cir. 1980).

33. Creamer v. General Teamsters Local Union 326, 579 F. Supp. 1284 (D. Del. 1984).

34. *In re* Catanella, 583 F. Supp. 1388 (E.D. Pa. 1984).

35. Bennett v. Berg, 685 F.2d 1053 (1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

36. DeMoss v. First Artists Prod. Co., 571 F. Supp. 409 (N.D. Ohio 1983), *appeal dismissed without opinion*, 734 F.2d 14 (6th Cir. 1984).

37. Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).

38. County of Cook v. Midcon Corp., 574 F. Supp. 902 (N.D. Ill. 1983).

39. Fields v. National Republic Bank, 546 F. Supp. 123 (N.D. Ill. 1982).

40. Indeed, in this author's review, *see supra* note 23, less than 6% of the cases indicated any link to organized crime (i.e., in the traditional sense, such as including known crime figures, violence, or other organized crime characteristics).

41. One district court characterized the "kernel of the debate" as whether the claims should be limited in order to "prevent the federalization of a large body of state law fraud." Yancoski v. E.F. Hutton & Co., 581 F. Supp. 88, 95 (E.D. Pa. 1983). The *Yancoski* court rejected the federalization argument, finding the concern unwarranted since § 1964(c) itself provides adequate standing requirements. *Id.* at 96. Other courts cite United States v. Turkette, 452 U.S. 576 (1981), in which the Supreme Court construed the criminal provisions of RICO and found that the statute and its legislative history indicated Congress's awareness that it was entering a "new domain of federal involvement" and that Congress was also well aware of the fear that RICO would "'mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm.'" *Id.* at 586–87 (citations omitted). Congress nonetheless enacted the measure over these objections, knowing it would alter the federal/state relationship.

42. *E.g.*, *Sedima*, 741 F.2d at 497. The Justice Department, by contrast, has issued guidelines for bringing a criminal RICO action. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, ch. 110 (March 9, 1984). The guidelines consist of six directives concerning the type of prosecutions that should and should not be brought under the statute. *Id.* ch. 9.110.300ff. The guidelines require that no RICO prosecution be commenced without the prior approval of the Organized Crime and Racketeering Section of the Department's Criminal Division. *Id.* ch. 9.110.320. *But cf.* Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 297–98 (1983) (Justice Department guidelines may not halt abuses in bringing criminal RICO cases, since these

eral advantage achieved by the pejorative connotation of racketeering.[43] Because of these concerns, courts have begun to restrict the right to maintain RICO civil actions. The following is a sketch of the major lines of analysis.

The first limitation employed by courts focused on a required link to organized crime.[44] If a defendant could not be characterized fairly as a member of an organized crime group, these courts reasoned that the statute was not meant to apply to them. In dismissing suits that failed to allege a nexus with organized crime, judges relied on legislative history to rule that the claims may be within the letter of the statute, but fall outside the spirit of the law.[45] The overwhelming majority of courts, however, have rejected the organized crime limitation.[46]

The second major limitation, the "racketeering injury" requirement,[47]

---

are merely advisory; the author questions whether Department approval effectively restrains zealous prosecutors).

43. *See, e.g.*, Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 682 (N.D. Ga. 1983) (citing the *in terrorem* effect of the statute); Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 GA. L. REV. 43, 46–47 (1983) (RICO is a tool for intimidation where "a plaintiff can smear a defendant with Mafia associations"); Tarlow, *supra* note 42, at 293, 416–17 ("prejudicial impact" results from racketeering label). The stigma of the racketeering label prompted the ABA to recommend replacing the term "racketeering activity" with the less pejorative phrase "criminal activity." SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES 1 (1982) [hereinafter cited as ABA REPORT].

44. The first civil RICO suit to impose an organized crime requirement was Barr v. WUI/TAS, 66 F.R.D. 109 (S.D.N.Y. 1975).

45. *E.g., id.* at 113.

46. *See In re* Catanella, 583 F. Supp. 1388, 1426–28 (E.D. Pa. 1984) (collecting criminal and civil cases requiring an organized crime connection, and those cases rejecting such a nexus; concludes overwhelming majority has rejected the requirement). *See also* Comment, *Putting a Halt to Judicial Limitations on Civil RICO,* 52 U. MO. KAN. CITY. L. REV. 56, 60 (1983) (majority view rejects a requirement to allege or prove organized crime connections). Despite the weight of authority, some recent court decisions have required a link to organized crime. *See, e.g.*, Aliberti v. E. F. Hutton & Co., 591 F. Supp. 632 (D.C. Mass. 1984); Gilbert v. Prudential-Bache Sec., Inc., [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,573 (E.D. Pa. 1984).

47. This requirement has been labeled alternatively as a "racketeering enterprise injury," or simply "RICO-type injury." For cases requiring a racketeering injury, see, e.g., Moss v. Morgan Stanley Inc., 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984); Bruns v. Ledbetter, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1006 (C.D. Cal. 1982); Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208 (E.D. Mich. 1981). The court in *Bruns* indicated as examples: "A 'racketeering enterprise injury' might be found if a civil RICO defendant's capacity to harm the plaintiff is enhanced by an infusion of cash from illicit activities . . . or if the plaintiff lost a cable TV franchise because of bribes paid by the defendant to the city council." 583 F. Supp. at 1056 (citations omitted). Further examples of racketeering injuries are provided in Bankers Trust v. Rhoades, 741 F.2d 511, 517 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657). *See infra* note 138.

Generally, courts requiring this special injury have not found the injury to exist in cases before them. A few courts have rejected the racketeering injury requirement but found that the case before them probably satisfied the requirement anyway. *See, e.g.*, Econo-Car Int'l, Inc. v. Agency Rent-A-Car, Inc., 589 F. Supp. 1368, 1377–78 (D. Mass. 1984); Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 413 (8th Cir. 1984).

focuses on whether the complaint alleges the appropriate kind of injury. Courts instituting this requirement hold that the injury alleged must be "something other" than that arising out of the commission of the predicate offenses. This reasoning is based on RICO's similarities to the Clayton Act. Congress, in requiring that a civil RICO plaintiff prove injury "by reason of section 1962," used language nearly identical to that found in section 4 of the Clayton Act.[48] Because the Supreme Court has interpreted the Clayton Act's "by reason of" language to require that a plaintiff prove antitrust injury,[49] courts have held that RICO's remedies should similarly be restricted to a special kind of injury.

Early civil RICO cases directly transplanted the antitrust "competitive injury" concept and required that RICO plaintiffs also must allege a competitive injury.[50] Later cases, however, repudiate such a strict interpretation.[51] Rather, these courts rely indirectly on analogies to the antitrust laws to create a "racketeering injury" requirement, holding that the injury must be "of the sort that RICO was enacted to remedy and deter."[52] Courts reason that RICO's legislative history supports the requirement for "something more," since Congress did not indicate it intended to create a new set of remedies for actions that had previously been the province of state or federal laws.[53] The racketeering injury requirement has been one of the most hotly disputed RICO issues in the federal courts; there does not appear to be a clear weight of authority either for or against this requirement.[54]

48. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15 (1982)).

49. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("[P]laintiffs must prove . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

50. *E.g.*, North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 210–11 (N.D. Ill. 1980) (RICO's purpose is to prevent the infiltration of legitimate business and interference with free competition).

51. The Seventh Circuit discredited *North Barrington's* competitive injury requirement in Schacht v. Brown, 711 F.2d 1343, 1357 (7th Cir. 1983) ("[S]uch a crabbed interpretation . . . does not fully credit Congressional intent or fulfill the purposes of RICO."), *cert. denied*, 104 S. Ct. 508 (1984). *See In re* Catanella, 583 F. Supp. 1388, 1431 (E.D. Pa. 1984) (citing cases which require and those which reject a competitive injury requirement, and concluding that the majority of courts have rejected the requirement).

52. Bruns v. Ledbetter, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984).

53. *See* Johnsen v. Rogers, 551 F. Supp. 281, 285 (C.D. Cal. 1982) ("Congress . . . did not intend to provide an additional remedy for an already compensable injury.").

54. *See* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 388 n.4 (7th Cir. 1984) (citing cases which require and those which reject a racketeering injury), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822).

Commentators also disagree on whether a racketeering injury is required. *Compare, e.g.*, Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1531 (1983) (the requirement suffers "[o]n the one hand [from being] illusory, and on the other, it is both under-inclusive and over-inclusive") *with* Bridges, *supra* note 43, at 68–71 (relation between RICO and antitrust laws supports requirement of a distinct § 1962 injury rather than just the predicate acts in § 1961).

Rather than adopt a general limitation, a third group of courts has relied on scrutiny of RICO claims, dismissing claims that did not adequately allege a particular element of the RICO cause of action spelled out in the statute. Judges have focused, for example, on "pattern of racketeering injury,"[55] "enterprise,"[56] and "injury in one's business or property."[57] Lack of proximate cause has also been used to dismiss cases where the plaintiffs were only indirect victims of the alleged RICO violations.[58] Finally, some courts have also examined the underlying predicate offenses to ensure that these independently could withstand dismissal, especially in cases of alleged securities fraud.[59]

---

55. Discussion has often focused on whether the "pattern of racketeering activity," as used in the Act, requires that the two or more acts be interrelated. *See, e.g.*, United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.) (rejecting that the acts must be interrelated, but noting that some district courts have held otherwise), *cert. denied*, 439 U.S. 953 (1978).

56. For example, one court held that the plaintiff's complaint did not state a RICO claim because there was neither a sufficient nexus between the defendants and the enterprise nor between the enterprise and interstate commerce. Gramercy 222 Residents Corp. v. Gramercy Realty Assocs., 591 F. Supp. 1408, 1411–12 (S.D.N.Y. 1984). Other courts have held that a complaint failed to state a cause of action under RICO because it did not distinguish the "enterprise," as the vehicle for the pattern of racketeering activity, from the culpable "person" whose conduct RICO proscribes. *See, e.g.*, Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350, 357 (S.D.N.Y. 1984). *Cf.* B.F. Hirsch, Inc. v. Enright Refining Co., 577 F. Supp. 339, 347 (D.N.J. 1983) (no requirement of separate identity between the "enterprise" and the "person"). *See also* Comment, *supra* note 46, at 66–70 (discussing how the enterprise element has been used to limit civil RICO cases).

57. *See, e.g.*, Morrison v. Syntex Laboratories, Inc., 101 F.R.D. 743, 744 (D.D.C. 1984) (RICO limits injury to one's business or property, not personal injury arising out of a products liability case); Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1137 (D. Mass. 1982) (plaintiff claimed losses from purchasing literature and services from the defendant church; court indicated "[w]e do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962").

58. *See, e.g.*, Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir. 1982), in which the court upheld dismissal of a RICO count brought by a company's independent auditors against the company and its former officers and directors. When stock purchasers sued the company for inflating its stock prices, the purchasers also alleged that the auditors were negligent in auditing the company's financial statements. As a result, the auditors had to settle claims with the purchasers. The auditors then alleged that RICO injuries were incurred "as a consequence of being used as a tool of the criminal enterprise." *Id.* The court held that the auditors lacked standing to maintain a civil RICO action, finding that the auditors only suffered indirectly from the violation. *Id.* In essence, the decision requires direct, proximately caused injury from the RICO violation.

59. Thus, where the allegations of fraud under the Securities Exchange Act were sufficient to state a claim, courts have held that the allegations were also sufficient to state a RICO claim. Conversely, where there was no valid securities fraud cause of action, the claim could not serve as a predicate offense under RICO. *Compare In re* Catanella, 583 F. Supp. 1358, 1425 (E.D. Pa. 1984) (claim sufficient under Securities Exchange Act of 1934 was adequate to support RICO claim) *with* Moss v. Morgan Stanley Inc., 719 F.2d 5, 18–19 (2d Cir. 1983) (since shareholder failed to state a valid claim of securities fraud, the RICO claim likewise failed), *cert. denied*, 104 S. Ct. 1280 (1984).

Courts have been especially concerned over the apparent inconsistency of allowing treble damages for what are essentially securities law violations, when the securities laws' damage provisions have been carefully restricted. *See, e.g.*, Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1007–08 (C.D. Cal. 1982) ("It is simply incomprehensible that a plaintiff suing under the securities laws would receive

II. *SEDIMA, S.P.R.L. v. IMREX CO.*

In *Sedima,* the Second Circuit imposed a new restriction on the right to maintain a RICO civil action: private civil suits under RICO may be pursued only after the defendant has been convicted of the predicate criminal violations.[60] The court in *Sedima* upheld a lower court's dismissal of RICO charges brought by Sedima, S.P.R.L., a Belgian importer, against Imrex Co., an American supplier of missile system parts. Sedima and Imrex had entered into a joint venture to provide electronic component parts to a NATO subcontractor in Belgium. Sedima charged that Imrex fraudulently inflated prices, and shipping and financing charges, and that these acts constituted a "pattern of racketeering." The district court dismissed the suit for failure to allege a racketeering injury.

In affirming the dismissal, Judge Oakes, writing for the two-to-one majority, said that recent uses of the civil RICO claim were "extraordinary, if not outrageous."[61] The court found there was "simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow."[62] Noting that the private civil remedy was added to RICO after most of the legislative history was already written, the court concluded that "Congress was not aware of the possible implications of section 1964(c)."[63] Further, the court stated that Congress would at least have discussed its intent to provide a federal forum for so many state law wrongs.

The *Sedima* court first affirmed a "racketeering injury" requirement, citing earlier cases that had endorsed the requirement.[64] The court then went beyond this requirement and held that, in addition, a prior criminal conviction is a prerequisite to a civil RICO action.[65] In discussing the necessity for a prior conviction, the court first reviewed other cases that had rejected the requirement. Judge Oakes found the reasoning in these cases

---

one-third the damages of a plaintiff suing under RICO for the same injury."); *see also* Bridges, *supra* note 43, at 45; Note, *supra* note 54, at 1522; Note, *supra* note 29, at 111–12. *But see* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action,* 85 DICK. L. REV. 201, 205 (1981) (urging use of RICO as an alternative remedy in securities fraud matters to offset the Supreme Court's restriction of the private cause of action under traditional securities law).

60. *Sedima,* 741 F.2d 482, 496 (2d Cir. 1984).

61. *Id.* at 487.

62. *Id.*

63. *Id.* at 492.

64. *Id.* at 494. The *Sedima* court found it reasonable to assume that the similarities to the language in the Clayton Act indicated Congress's desire to have an analogous standing limitation imposed in RICO. While the court agreed that the antitrust competitive injury requirement should not be directly imposed, it indicated that the RICO plaintiff must show "injury different in kind from that occurring as a result of the predicate acts themselves, . . . but also caused by an activity which RICO was designed to deter." *Id.* at 496.

65. *Id.* at 496.

unpersuasive, noting that the district courts had rejected the requirement with little analysis.[66] In determining that prior convictions are a prerequisite for standing under civil RICO, the court relied on the fact that civil RICO liability depends upon proving "indictable" or "chargeable" acts that are criminal.[67] The court expressed particular concern that this criminal conduct would be established based only on a preponderance of the evidence in civil RICO actions, rather than by proof beyond a reasonable doubt.[68] The court held that, since the legislative history shows that Congress assumed a preponderance standard was appropriate, "[t]he most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit."[69] Judge Cardamone in his dissent wrote a point-by-point rebuttal of the majority's analysis.[70]

III. ANALYSIS OF PRIOR CRIMINAL CONVICTION REQUIREMENT

By making prior criminal convictions a prerequisite, the Second Circuit attempted to fashion a limitation that would control the breadth of RICO's civil component. Prior to *Sedima,* few commentators or courts assessed the need for a prior criminal conviction.[71] Reaction to *Sedima's* holding has been swift, with defense lawyers generally applauding the decision and plaintiffs' lawyers denouncing it.[72] Many predict confusion until the

66. *Id.* at 496–97. The *Sedima* majority noted that many of the cases rejected a prior criminal conviction requirement based on the authority of United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), a case affirming the government's right to bring civil suits for acts that are also punishable as crimes. The *Sedima* court stated that such reliance was misplaced, since there are policy differences between government and private actions, and civil actions are unrestrained by prosecutorial discretion. 741 F.2d at 497. The dissent countered that to dismiss *Cappetto* because it made no holding with respect to private civil actions puts the majority at odds with other Second Circuit panels that have cited *Cappetto* with apparent approval in other respects. *Id.* at 504 (Cardamone, J., dissenting).

67. 741 F.2d at 499; *see supra* note 18 (discussing the underlying predicate acts).

68. 741 F.2d at 501.

69. *Id.* at 502.

70. *Id.* at 504–08 (Cardamone, J., dissenting).

71. For a listing of cases that reject a requirement of prior criminal convictions, see *id.* at 496–97. Most commentators who urge courts to restrict the civil RICO cause of action propose other limitations. *See, e.g.,* Bridges, *supra* note 43, at 81 (recommending the imposition of guidelines for applying RICO to securities violations), 46 (but commenting that "a plaintiff need not point to convictions").

72. Flaherty, *A RICO Crisis,* Nat'l L.J., Aug. 13, 1984, at 1, col. 3 (reporting positive and negative reactions of lawyers). A *New York Times* editorial, while sympathetic to the problem caused by the expansive uses of RICO, opined that the "judges crossed a thin line between interpreting a law and rewriting it to suit their concept of fairness." *Using, and Abusing, the Rackets Law,* N.Y. Times, Aug.

Supreme Court addresses RICO's civil provisions.[73]

The prior criminal conviction requirement would provide definite guidance to district courts in determining when a plaintiff can bring a civil RICO action,[74] even though some questions in defining "conviction" remain.[75] The requirement, however, receives little support from either the

---

21, 1984, at A-24, col. 1.

The Seventh and Eighth Circuits addressed *Sedima* without analyzing the prior criminal conviction requirement. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 393 n.12 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822); Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 413 n.11 (8th Cir. 1984). The Fourth Circuit recently upheld the sufficiency of a RICO claim apparently without requiring a prior criminal conviction. Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984). Some district courts outside the Second Circuit have rejected the reasoning in *Sedima*. *See, e.g.*, Bennett v. E.H. Hutton Co., Inc., No. C83-1502A (N.D. Ohio Nov. 28, 1984) (prior conviction requirement is contrary to Sixth Circuit precedent in USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982)) (available on LEXIS, Genfed library, Dist file); Kitchens v. U.S. Shelter, No. 82-1951-1 (D.S.C. Oct. 20, 1984) (available on LEXIS, Genfed library, Dist file); Grado v. Gross, No. 84-1087-MA (D. Mass. Aug. 20, 1984) (available on LEXIS, Genfed library, Dist file); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 255 (D.C. Kan. 1984) (calling the prior criminal conviction requirement a "well-intended attempt" to slow the growing backlog of civil RICO cases, but stating that the statute's language and legislative history "do not countenance such limitations on civil RICO").

Other district courts have followed *Sedima*, thus dismissing civil RICO cases where no prior criminal conviction was alleged. *See, e.g.*, Bernstein v. Bank Leumi Le-Israel B.M., No. 84-2065 (E.D. Pa. Dec. 5, 1984) (available on LEXIS, Genfed library, Dist file); Berg v. First Am. Bankshares, Inc., [Current] FED. SEC. L. REP. (CCH) ¶ 91,826, at 90,161–62 (D.D.C. Oct. 19, 1984) (adopting *Sedima's* requirement for prior criminal conviction, but rejecting the racketeering injury requirement as "too nebulous"); Gardner v. Surnamer, No. 82-2723 (E.D. Pa. Oct. 17, 1984) (dismissing on both of *Sedima's* grounds) (available on LEXIS, Genfed library, Dist file).

73. Flaherty, *supra* note 72, at 1; Easton, *Split Over RICO Provisions Widens*, Legal Times, Oct. 29, 1984, at 1, col. 2.

74. Administrative ease has been suggested as a legitimate consideration when a search for legislative meaning has been inconclusive. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 820 (1983).

75. Courts applying *Sedima* will need to decide, for example, whether pleas of guilty or nolo contendere are sufficient to satisfy the prior criminal conviction requirement. In response to criminal charges, a defendant may plead not guilty, guilty or nolo contendere. *See, e.g.*, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, CRIMINAL ANTITRUST LITIGATION MANUAL 49 (1983). A guilty plea is an admission that the charges and each of their elements are correct as alleged. In a nolo contendere plea, the defendant admits his guilt for purposes of punishment, but does not necessarily admit to the charges. *Id.* The Supreme Court has stated in another context that a guilty plea "is itself a conviction" of the offense charged. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

A court also must decide when the statute of limitations begins to run. The RICO statute does not contain a statute of limitations governing private civil actions. Courts have applied the statute of limitations of the most closely analagous state claims. *See, e.g.*, Seawell v. Miller Brewing Co., 576 F. Supp. 424, 427 (M.D.N.C. 1983). However, federal law controls when the cause of action accrues; generally this is when the plaintiff knew or should have known of alleged injuries underlying the complaint. *Id.* at 427–28. If a court were to require a prior criminal conviction, the most plausible time for accrual would probably be the date of conviction itself. *See* Creamer v. General Teamsters Local Union 326, 579 F. Supp. 1284, 1291 (D. Del. 1984) (civil plaintiffs had knowledge of their RICO claim upon availability of transcript from the prior criminal trial).

Another unresolved question is collateral estoppel. The statute only addresses collateral estoppel in civil suits brought by the government. 18 U.S.C. § 1964(d) (1982). Courts have nonetheless given

language of the statute or its legislative history. Further, it creates significant barriers for many civil RICO plaintiffs for whom Congress intended to provide a remedy. The prior criminal conviction requirement also is contrary to the private attorney general concept which Congress incorporated into the RICO statute. RICO's liberal construction clause[76] reinforces the view that Congress did not intend the civil provision of the statute to be construed so narrowly.[77]

A. Statutory Analysis

In its two RICO cases, the Supreme Court reaffirmed that a court must look first to a statute's language to determine its scope.[78] Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a *violation of section 1962* of this chapter may sue therefor . . . ."[79] Inquiry into the scope of the cause of action must begin, then, with a determination of the meaning of the phrase "violation of section 1962" as used in the statute. Section 1962 states that certain kinds of acts, when accomplished through a pattern of racketeering activity, are unlawful.[80] "Racketeering activity," in turn, is defined in section 1961 as meaning certain predicate acts "chargeable under State law" or "indictable" under certain federal statutes.[81]

---

collateral estoppel effect to prior criminal convictions in RICO actions brought by private plaintiffs. *See* Anderson v. Janovich, 543 F. Supp. 1124, 1128–29 (W.D. Wash. 1982); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 644 (D. Alaska 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 682–83 (N.D. Ind. 1982).

76. *See supra* note 21 and accompanying text.

77. Posner, *supra* note 74, at 818 n.61 (suggesting that judges should be alert to any sign of legislative intent regarding the freedom for interpreting statutes, and citing RICO as an example of a statute in which Congress indicated its intent for broad construction).

The Supreme Court relied, at least in part, on the liberal construction clause in both of its decisions construing criminal RICO. Russello v. United States, 104 S. Ct. 296, 302 (1983); United States v. Turkette, 452 U.S. 576, 587 (1981). In *Russello*, the Court construed the term "interest" in § 1963(a)(1), holding that the language of the statute plainly indicated that the term covered the insurance proceeds petitioner received as a result of arson activities. 104 S. Ct. at 300. In *Turkette*, the Court held that "enterprise" as it was used in RICO encompassed both legitimate and illegitimate enterprises. 452 U.S. at 593.

The Court has not yet addressed RICO's civil cause of action; both *Russello* and *Turkette* refer only to the statute's criminal provisions. The civil cause of action, however, is based upon establishing that the defendant committed acts prohibited by the Act's criminal provisions. Thus it creates a basic dependence in the civil arena on the criminal provisions and the decisions construing those provisions.

78. *Russello*, 104 S. Ct. at 299; *Turkette*, 452 U.S. at 580 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

79. 18 U.S.C. § 1964(c) (1982) (emphasis added).

80. *Id.* § 1962; *supra* notes 14–17 and accompanying text.

81. *Id.* § 1961; *supra* note 18 and accompanying text.

The term "violation" is not specifically defined in the RICO statute. In cases of silence, courts usually assume that the legislature expressed itself with words used according to their ordinary meaning.[82] The dictionary defines "violation" as an act or instance of breaking a law or regulation.[83] A person "violates" a law at the time he does what the law forbids, not when he is convicted of doing so; the violation occurs even if the violator is never caught. Thus, on its face the statute does not imply that only those parties who have been injured by persons convicted of RICO violations can bring actions.[84] Furthermore, Congress has used the word "violation" in other statutes to apply in a civil as well as a criminal context.[85]

The same analysis applies to "indictable" and "chargeable." The suffix "-able" means "capable of, fit for, or worthy of," or "susceptible of."[86] The statute should be read to give effect to Congress' choice of the subjunctive. Thus, an individual who has committed chargeable or indictable acts need be merely susceptible to criminal prosecution to qualify as a civil RICO defendant. A fair reading of the statute is that a defendant need not have been already charged or indicted—much less convicted—for those acts.

The *Sedima* court, in essence, rewrote the statute instead of interpreting its language. The *Sedima* court imposed the prior criminal conviction requirement in part because civil courts do not traditionally determine which facts lead to "indictable" or "chargeable" acts.[87] This, it said, is the proper function of grand juries and prosecutors, respectively. What the

82. *Russello*, 104 S. Ct. at 299.

83. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1430–31 (W. Morris ed. 1981) defines "violation" as "[t]he act of violating or the condition of being violated" or "[a]n instance of violation; a transgression; desecration; infraction." It defines the verb "violate" as "to break (a law or regulation, for example) intentionally or unintentionally." *Id.* at 1430.

84. Judge Oakes argues in *Sedima* that the differences between the particular words in RICO and those in the Clayton Act are instructive, and that the change was made with the intent in mind to require prior conviction of the predicate acts. 741 F.2d at 498. The Clayton Act provision reads in relevant part "by reason of anything forbidden," while § 1964(c) of RICO reads "by reason of a violation." As Judge Oakes notes, there is nothing in the legislative history to indicate why the House chose this language over that in the Clayton Act. In view of the plain language of the statute, however, it seems equally reasonable to assume Congress was "eschew[ing] surplusage," an interpretation rejected in *Sedima*. *Id.*

85. *See* United States v. Ward, 448 U.S. 242, 251 (1980) (a "violation"—the term used by Congress—of the Federal Water Pollution Control Act leads to civil, not criminal liability); *see also* Grado v. Gross, No. 84-1087-MA (D. Mass. Aug. 20, 1984) (available on LEXIS, Genfed library, Dist file) ("[A]s anyone whose parked car has overstayed its welcome on metered city streets can testify, the word 'violation' has meaning in the civil as well as the criminal context.").

86. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 45 (F. Mish ed. 1983) defines the suffix "-able" as meaning "capable of, fit for, or worthy of." THE AMERICAN HERITAGE DICTIONARY, *supra* note 83, at 3, defines the suffix as "susceptible, capable, or worthy of."

87. *Sedima*, 741 F.2d at 500.

majority did was to rewrite the statute to read "indicted" under federal law or "charged" under state law.[88]

The majority further rewrote "indictable" or "chargeable" to mean "convicted." The *Sedima* court purported to look to the intent behind RICO as a whole to conclude that the act was designed to combat conduct that had already been found criminal.[89] The court reasoned that RICO liability does not exist without criminal conduct,[90] and the only way to prove criminal conduct in a civil action is by proving a previous criminal conviction. This reading ignores the fact that Congress chose the words "indictable" and "chargeable," and not "convicted." Congress' use of the word "conviction" elsewhere in the statute[91] supports a conclusion, contrary to the court's, that the absence of the word in section 1964(c) was deliberate.

It is not easy to dismiss, however, the court's concern that "inherently criminal" conduct is determined under RICO only upon proof by a preponderance of the evidence.[92] If one assumes that "racketeering activity" consists only of criminal conduct,[93] Judge Oakes may be correct in ques-

88. If the Second Circuit had stopped with "indicted" as its interpretation, it might have allowed *Sedima's* action, since Imrex was reported to have been indicted by a grand jury for allegedly falsifying financial documents. *See Racketeering Act's Use in Civil Suits is Curbed Sharply,* Wall St. J., July 27, 1984, § 1, at 8, col. 2 (indicating that the motion for dismissal of these charges was pending).

89. *Sedima,* 741 F.2d at 500.

90. To support its finding that the conduct referred to is inherently criminal, the court in *Sedima,* 741 F.2d at 501, cited United States v. Campanale, 518 F.2d 352, 365 n.36 (9th Cir. 1975) ("the acts constituting racketeering activity must themselves be criminal offenses"), *cert. denied,* 423 U.S. 1050 (1976); Salisbury v. Chapman, 527 F. Supp. 577, 579 (N.D. Ill. 1981) ("RICO does not contain any substantive prohibitions unknown to other sections of federal criminal law. Instead, it confers upon victims of certain criminal violations the right to proceed in a civil suit against the offenders.").

91. 18 U.S.C. § 1963(c) (1982) provides that "[u]pon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section . . . ." Section 1964(d) provides that a previously convicted RICO defendant shall be estopped from denying the essential allegations of the criminal offense in any subsequent government civil proceeding. *Id.* § 1964(d).

92. The Supreme Court in Steadman v. Securities & Exchange Comm'n, 450 U.S. 91, 95–96 (1981) stated that when Congress has not indicated a specific standard of proof, the judiciary must resolve the question by referring to the legislature's intent. The few cases that have addressed the burden of proof issue in civil RICO actions have concluded that the preponderance standard is appropriate. *See* Matz, *Determining the Standard of Proof In Lawsuits Brought Under RICO,* Nat'l L.J., Oct. 10, 1983, at 21, col. 1. Matz indicates that the burden of proof in civil RICO actions has been referred to in only eight published cases, and none has carefully analyzed the issue. *Id.* at 25, col. 1. Many of the private civil cases simply rely on the fact that government civil proceedings use the preponderance standard. *See, e.g.,* Parnes v. Heinhold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980).

Legislative history indicates that Congress chose the preponderance standard for government civil actions over the objections of some witnesses who felt that the pattern of racketeering activity should be proved beyond a reasonable doubt. *House Hearings, supra* note 12, at 106–07, 664, 687. *But see id.* at 187 (opposing view advocating the beyond a reasonable doubt standard).

93. *Sedima,* 741 F.2d at 499. The definition of racketeering is discussed *supra* notes 47–54 and accompanying text.

tioning whether private plaintiffs should be able to establish this element against the lowest burden of proof when each element in a criminal prosecution must be proved beyond a reasonable doubt. Nonetheless, on its face the statute does not prescribe a higher burden of proof any more than it requires a criminal conviction. Furthermore, no court, including the *Sedima* court, has held that section 1964 is unconstitutional because the plaintiff bears a lower burden of proof.[94] In the absence of congressional intent to the contrary or an explicit finding of unconstitutionality, the least onerous burden of proof is most likely the appropriate reading of the statute's requirements.[95]

94. Judge Cardamone explored the constitutionality of § 1964 absent criminal convictions. *Sedima*, 741 F.2d at 506 (Cardamone, J., dissenting). He reviewed the steps that the Supreme Court established for cases in which civil remedies are challenged for being "quasi-criminal." Applying these steps, he concluded that because the statute is "primarily remedial," § 1964(c) is constitutional. *Id.* at 507.

Early articles addressed similar concerns over the quasi-criminal aspects of the government's civil remedies of forfeiture and divesture. *See* Note, *Criminal Law—Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 TEX. L. REV. 1055, 1065 (1975) (cautioning restraint in use of divestiture because of quasi-punitive nature); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 222 (1975) (concluding that the equitable remedies are constitutional despite their criminal nature).

95. Matz, *supra* note 92, at 26, col. 4, concludes that the Supreme Court would probably apply the preponderance standard. Nonetheless, Matz suggests that a more exacting standard such as clear and convincing evidence may be more appropriate than the preponderance standard, at least for proving a pattern of racketeering activity. *Id.* at 21, col. 1. The Supreme Court has imposed this standard as a constitutional requirement in civil cases where quasi-criminal activity is alleged. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 748 (1982) (due process requires a clear and convincing standard in a proceeding initiated by a state to terminate the rights of natural parents to retain custody over their children); Addington v. Texas, 441 U.S. 418, 423 (1979) (clear and convincing standard required in proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital). *But see* Herman & MacLean v. Huddleston, 459 U.S. 375, 389–90 (1983) (rejecting a clear and convincing standard or any standard more stringent than the preponderance test for securities fraud damage actions, despite the fact that the civil action may be predicated upon fraud constituting a criminal offense).

The Supreme Court has held that an elevated standard is appropriate where the individual interests at stake are both "particularly important" and "more substantial than mere loss of money." *Addington*, 441 U.S. at 424. In civil RICO cases, the stigma of racketeering activity could well involve a significant interest that exceeds the loss of money. Nonetheless there are practical reasons for maintaining a preponderance standard. A clear and convincing standard may be unwieldy and potentially confusing for juries, especially if applied to only one part of the cause of action, namely, proof of committing a pattern of racketeering activity.

The dissent in *Sedima* noted that other civil actions have successfully applied a heightened standard of proof. *Sedima*, 741 F.2d at 506 (Cardamone, J., dissenting) (citing C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 339–40 (2d ed. 1972) as listing cases in fraud, defamation, paternity and other types of actions where courts have imposed a heightened burden). Thus the concerns of *Sedima's* majority could be rectified without requiring prior criminal convictions. *See infra* note 135.

In its RICO cases, the Supreme Court ruled that absent a clearly expressed legislative intent to the contrary, unambiguous statutory language must be regarded as conclusive.[96] As Judge Oakes noted in *Sedima,* RICO's civil provisions were enacted with little discussion.[97] From this "clanging silence," Judge Oakes inferred that Congress did not intend a broad application of RICO. He reasoned that if Congress had meant civil RICO to apply so broadly, it would have said so.[98] An equally plausible interpretation, however, is that Congress simply did not intend the act's scope to be limited. Indeed, there is some evidence to indicate that Congress was aware that the statute did not require prior criminal convictions.[99] Nowhere does the legislative history indicate that Congress intended that a RICO victim's ability to assert rights created by the statute should depend upon the prosecutor's office.

B. Effect on Plaintiffs

The *Sedima* majority argued that the prior criminal conviction requirement should not create significant additional barriers for plaintiffs.[100] A review of cases to date, however, supports the dissent's concern that the requirement might exclude plaintiffs where the defendants' conduct "would be near the heart of Congress' concern."[101] Precluding a RICO claim might not deny all relief to a plaintiff, since the majority of civil RICO cases also allege alternative federal or state claims;[102] nonetheless, any congressional purpose in enacting the private civil RICO provisions may well be thwarted.

The requirement of prior criminal convictions restricts the plaintiff's cause of action to a narrow sphere. In reality, however, the circle of wrongdoing from racketeering is probably far greater.[103] The requirement

96. Russello v. United States, 104 S. Ct. 296, 299 (1983); United States v. Turkette, 452 U.S. 576, 580 (1981) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

97. *Sedima,* 741 F.2d at 488–92.

98. *Id.* at 492.

99. Representative Mikva, at the time he offered an amendment to curtail frivolous suits under civil RICO, stated that "there need not be a conviction under any of these laws for it to be racketeering." 116 CONG. REC. 35,342 (1970). *See also Victims of Crime: Hearing Before the Subcomm. of Criminal Laws and Procedures of the Senate Comm. of the Judiciary,* 92d Cong., 1st Sess. 323, 329 (1972) (Library of Congress statement) (comparison of civil RICO with antitrust laws weighs heavily against interpretation that RICO requires prior convictions).

100. 741 F.2d at 503.

101. *Sedima,* 741 F.2d at 510 (Cardamone, J., dissenting) (citing Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983)).

102. *See supra* note 29 for statistics.

103. Few of the civil RICO cases in the recent "explosion" of activity, *see supra* note 23, have

ignores the possibility that a prior civil judgment might establish criminal behavior.[104] The requirement also ignores the fact that the cost of a criminal trial, in terms of both time and money, forces prosecutors to choose cases carefully.[105] Not only might the government decide against prosecuting a particular case, but an indictment might also fail to achieve a conviction,[106]

followed government prosecutions. For cases following a prior criminal conviction, see Cullen v. Margiotta, 618 F.2d 226 (2d. Cir. 1980); Creamer v. General Teamsters Local Union 326, 579 F. Supp. 1284 (D. Del. 1984); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982); Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982); Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981).

Private civil RICO actions have also followed a criminal indictment. *See, e.g.*, International Business Machines v. Hitachi, Ltd., No. C-82-4976 (N.D. Cal. filed Sept. 16, 1982), an unreported civil RICO case discussed in Miller & Olson, *supra* note 4, at 74–75, in which IBM filed a civil RICO action after the FBI organized a sting operation that led to the criminal indictment of Hitachi for alleged possession of IBM trade secrets.

104. *See, e.g.*, Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984) (held that testimony during a civil trial clearly showed violations of a state anti-bribery statute, thus constituting the predicate offenses needed to establish a pattern of racketeering activity for a RICO claim).

In one of the few articles to discuss limiting civil RICO suits by requiring prior government action, one author suggests that a prior civil proceeding might adequately establish standing. Note, *Civil Rico: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1119 (1982) (Congress might curb the statute by requiring a "prior determination of liability in a government criminal or civil proceeding").

105. *See, e.g.*, Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 228 n.28 (1983) ("Public enforcers have very different incentive structures from private enforcers, with the result that they may tend to concentrate on those cases likely to generate greater publicity and political visibility.").

The decision not to prosecute, which is inherent in the criminal justice system, can be illustrated by reviewing the process by which alleged securities violations are pursued. The Securities and Exchange Commission (SEC) has broad subpoena powers which it delegates to staff members investigating suspected violations of the federal securities laws. After review at various levels, any one of which may result in dropping the prosecution, the SEC refers the matter to the Department of Justice with a recommendation that certain persons be indicted and prosecuted. If the Justice Department concurs in the recommendation, the matter will be brought before a grand jury and, assuming indictment, prosecuted by the United States Attorney. *See, e.g.*, H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW §§ 1.15[1], 3.19[1], 8.01 (1984) (discussing SEC enforcement procedures). With so many levels at which the prosecution may be dropped, it is not surprising that only the most egregious securities law violations result in criminal convictions.

This is not to say that the criminal sanctions for securities violations are not effectively employed. One author reports that between 1970 and 1980, the SEC referred more than 650 cases to the Justice Department for possible criminal prosecution. During that decade, the Justice Department obtained nearly 400 indictments that named 1400 defendants and resulted in nearly 1000 convictions. Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW 129, 149 (1984). The breadth of the criminal provisions of the major federal securities laws is unparalleled in other federal regulatory statutes. *Id.* at 147. Almost every major federal securities act includes a provision that makes it a potential felony if the actor has willfully and/or knowingly violated any provision of the act, or any rule or regulation thereunder. *Id.* at 147–49 (citing relevant securities laws).

106. For example, of the 434 criminal antitrust cases brought by the Justice Department between 1975 and 1983, defendants were found guilty at trial in only 42 of the cases. *See* SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, *supra* note 75, at App. E.

or the prosecutor might accept a plea bargain.[107]

The criminal conviction requirement could also result in turning the treble damage provision into "little more than a mirage"[108] when read in connection with RICO's forfeiture provision.[109] Under this provision, the Attorney General may seize all interests that the convicted violator has acquired or maintained as a result of racketeering.[110] A subsequent civil litigant might find RICO violators judgment-proof. Yet the prior criminal conviction requirement would prevent the litigant from bringing a claim against any solvent but unconvicted defendants.[111]

C. Impact on the Private Attorney General Concept

In searching for the meaning of a statute, courts must consider the purposes it was meant to serve and the problems it was meant to remedy.[112]

107. For civil RICO, plea bargaining would probably have its greatest effect in state criminal actions or federal actions other than criminal RICO. Because a criminal RICO charge is usually a major count of the indictment, the United States Attorney would not be likely to plea bargain away this count. *See generally* U.S. DEPARTMENT OF JUSTICE, *supra* note 42.

108. Grado v. Gross, No. 84-1087-MA (D. Mass. Aug. 20, 1984) (available on LEXIS, Genfed Library, Dist file). The *Grado* court notes that the Second Circuit in *Sedima* did not touch upon the relationship of § 1964(c) to forfeitures. The court doubted that RICO's drafters intended that plaintiffs in this situation should be denied recovery. Id.

109. The effect of forfeiture is illustrated in Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495 (1983), 579 F. Supp. 1284 (D.Del. 1984), a civil RICO case following a criminal conviction. In *Creamer,* employees sued a union local and two co-employers, Universal Coordinators, Inc. (UCI) and Inland Container Corporation. The employees claimed that the union breached its duty of fair representation and the employers breached their collective bargaining contract when the employers bribed the union to ignore violations of that contract in firing union employees to hire non-union people. The union president and principals of defendant UCI were earlier convicted of racketeering offenses. Between the first published civil decision in March 1983 and a second decision in January 1984, the assets of defendant UCI were forfeited to the government, forcing the elimination of UCI as a defendant in the civil action.

110. RICO's broad forfeiture provision provides that "[u]pon conviction of a person under [§ 1963] the court shall authorize the Attorney General to seize all property declared forfeited under [that section]." 18 U.S.C. § 1963(a) (1982). The property declared forfeited under § 1963 includes "any interest [the violator] has acquired or maintained in violation of section 1962." Id.

111. As in *Creamer,* civil suits following prior criminal convictions are often brought against defendants different from those in the criminal case. *See, e.g.,* Cullen v. Margiotta, 618 F.2d 226 (2d Cir. 1980) (city and county employees brought a class action against Nassau County, the Town of Hempstead, the Republican Committees of the county and town, and various county and Republican party officials, alleging that the defendants routinely extorted political contributions to the Republican Party as a condition of plaintiffs' employment and promotion in civil service jobs; only defendant Margiotta was earlier convicted of federal offenses related to these events).

One can only surmise that the plaintiffs' choice of defendants relates to their perceived chances of recovering damages. It may be that the criminally convicted defendant is not always the most advantageous defendant in a civil action from a plaintiff's point of view. A requirement of prior convictions could increase plaintiffs' agitation for prosecution of the deep-pocket defendants. Similarly, defendants would be anxious for pleas or reduced charges to avoid subsequent civil suits. These civil considerations seem inappropriate in the criminal process.

112. *See, e.g.,* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 58.06 (4th ed.

One suggested approach is that judges should first imagine themselves in the place of the enacting legislator by looking at the values and attitudes of the period in which the legislation was enacted.[113] Prior to passage of the Organized Crime Control Act in 1970, concern over the problem of organized crime had been building for two decades.[114] The infiltration of business by organized crime was well documented by 1967 when the President's Commission on Law Enforcement and Administration of Justice recommended civil remedies to help control this problem.[115] The government's quest for effective measures to attack organized crime's economic base culminated in the passage of RICO.

The majority in *Sedima* dismissed as irrelevant the early legislative debate surrounding RICO's civil remedies, since section 1964(c)—the private civil remedy—was added after this debate.[116] Nonetheless, this earlier debate provides an additional clue to the legislature's purpose in adding a private cause of action. Organized crime was considered durable, in part because of its high resistance to traditional methods of crime control.[117] As the Supreme Court has observed, the legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.[118]

As one of these "new" remedies, section 1964(c) was modeled after the private enforcement provision of the antitrust laws.[119] Congress was aware that giving treble damages to private antitrust plaintiffs serves not only to provide private relief, but also serves the "high purpose of enforcing the antitrust laws."[120] Therefore, it seems likely that Congress, by adding a

---

1984) ("It is ancient wisdom that statutes should be interpreted so that the manifested purpose or object can be accomplished.").

113. Posner, *supra* note 74, at 818.

114. As early as 1950 the problem of criminal infiltration of legitimate business was documented. *See* S. Rep. No. 2370, 81st Cong., 2d Sess. 16 (1950).

115. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187 (1967). In Chapter 13, "A National Strategy," the Commission advocated a coordinated effort against organized crime, to include a coalition of federal and private resources working together. *Id.* at 279–91. While the Commission did not address use of private suits, its recommendations for noncriminal controls included use of existing regulatory authority against businesses controlled by organized crime, and encouraging private business groups to prevent and uncover criminal business tactics. *Id.* at 208.

116. *Sedima*, 741 F.2d at 489.

117. For example, the 1970 Organized Crime Control Act's Finding No. 5 stated that organized crime continued to grow because of defects in the law's evidence-gathering process and because the present government sanctions and remedies were limited in scope and impact. Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

118. Russello v. United States, 104 S. Ct. 296, 302 (1983).

119. *See supra* note 13 and accompanying text.

120. Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100, 130–31 (1969). *See also* Fortner Enters. Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) ("Congress has encouraged

private, treble-damage RICO remedy, meant to incorporate what has been called the "most noteworthy feature" of the antitrust private remedies: the "private attorney general" concept.[121]

Private attorneys general serve to vindicate a "public interest"[122] by supplementing public efforts to detect violators and bringing actions that otherwise might not be initiated.[123] The private attorney general concept has become a favorite tool of Congress for improving the effectiveness of its laws. In addition to the antitrust area, Congress has relied on private attorneys general to enforce environmental and securities laws and other statutory policies.[124]

Sedima's prior criminal conviction requirement nullifies the attorney general concept in civil RICO. By following only in the wake of a government conviction, the civil RICO plaintiff no longer serves to broaden the scope of law enforcement.[125] Piggybacking onto government action places

---

private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition"); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

121. Grado v. Gross, No. 84-1087-MA (D. Mass. Aug. 20, 1984) (available on LEXIS, Genfed library, Dist file) ("it seems unlikely that Congress did not intend to incorporate what is probably the most noteworthy feature of the antitrust law's system of private remedies: the fact that private parties are authorized to act as private attorney generals [sic], and are not required to wait until the 'public' attorney general has acted.").

Others have also concluded that RICO includes a private attorney general concept. *See, e.g.*, Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 567 (N.D. Cal. 1984) ("RICO casts civil litigants in the role of private attorneys general in combating organized crime"); Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 285, 324–25 (1983) (a civil RICO plaintiff is as much a private attorney general as an antitrust plaintiff).

122. The term "private attorney general" dates from 1943 when Judge Jerome Frank first used it to describe private persons authorized to bring suits "to vindicate the public interest." Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943); *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (by offering potential antitrust litigants the prospect of a treble recovery, "Congress encouraged these persons to serve as 'private attorneys general'").

123. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (discussing securities law); *see also* Coffee, *supra* note 105. Coffee observed that private litigation is potentially more efficient, since the private attorney general can react more quickly than the public enforcer. Private litigation also helps ensure the stability of legal norms; in performing a failsafe function, it helps prevent federal laws from being underenforced due to budgetary cutbacks or changes in political philosophy. *Id.* at 226–27. Coffee characterized private suits following government actions as "free-riding," *id.* at 223–24, and criticized these as an improper use of the private attorney general concept. *Id.* at 226.

124. Coffee, *supra* note 105, at 216 n.3 (listing major federal statutes that authorize an award of attorneys' fees to finance private attorneys general).

One district court claimed that "the general public interest in the enforcement of RICO is at least as great as the public interest in the enforcement of antitrust laws." S.A. Mineracao Da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566, 575 (S.D.N.Y.), *aff'd*, 745 F.2d 190 (2d Cir. 1984).

125. Nonetheless, private treble damages in a civil action following criminal convictions do serve to intensify the penalty. Senator Hruska noted that RICO offers an "extraordinary potential for striking a mortal blow against the property interests of organized crime." 116 CONG. REC. 602 (1970); *see also House Hearings*, *supra* note 12, at 544 (statement of Edward L. Wright, ABA president-elect) (noting that some legislative proposals to combat organized crime recognized that "money is the key to power in the underworld").

private litigation where it may be needed least—subsequent to the violator's detection and conviction. By reducing the effectiveness of the private attorney general concept, the prior criminal conviction requirement directly contradicts the enacting legislature's desire to fashion "new remedies in order to achieve its far-reaching objectives."[126]

IV. THE SEARCH FOR REASONED LIMITS TO RICO

The judiciary's various attempts to limit civil RICO suits suggest that the private attorney general concept is not operating effectively in the battle to combat organized crime. The limitations reflect judicial discomfort with rising caseloads[127] and concern that suits are being brought that are far removed from what Congress intended. Even those who oppose judicial restrictions on civil RICO agree that Congress may not have foreseen the broad application of the statute.[128]

Yet legislatures generally draft statutes without a full appreciation of the potential problems in their application.[129] Courts must decide the precise effect of these statutes in specific fact situations, applying limitations whenever necessary to fulfill the enacting legislature's purposes.[130] The

126. Russello v. United States, 104 S. Ct. 296, 302 (1983).

127. *See supra* note 23 for statistics. However, Professor Blakey, one of the drafters of the statute, denies there is any overload of RICO cases. Flaherty, *supra* note 72, at 30.

128. For example, the Seventh Circuit rejected other courts' limitations of the statute, stating that Congress "chose to employ that extraordinarily broad language in order to achieve its desired goals." Haroco, Inc., v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822). Nonetheless, with respect to the bank fraud case before it, the court commented that "it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank." *Id.* at 399.

129. *See* Posner, *supra* note 74, at 801, who noted that most canons of construction inaccurately impute an omniscience to Congress that is unrealistic. Ambiguities in interpreting statutes may result, not necessarily from poor drafting, but from the fact that the legislative process necessarily precedes determination in specific situations.

130. Underlying much of the controversy over civil RICO is the propriety of judicial restrictions, rather than leaving further statutory limitations to Congress. For commentaries urging that it is proper for courts to apply limits to RICO suits, *see, e.g.*, Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 892 (1980) (referring primarily to criminal RICO); Bridges, *supra* note 43, at 79; Tarlow, *supra* note 42, at 424.

For commentaries advocating that RICO can only be restricted by Congress, see Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1031 (1980); Blakey, *supra* note 12, at 348–49; Wexler, *supra* note 121, at 287–88; Comment, *supra* note 46, at 71; Note, *supra* note 104, at 1119. Blakey, in particular, has been widely cited for proposing a broad reading of the statute.

In antitrust litigation, courts have recognized that Congress's intent to have potential litigants serve as private attorneys general does not mean that "the antitrust laws [should] provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972); *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977) (Court denied standing under antitrust to indirect purchasers).

Recent Supreme Court actions have also narrowed the availability of an implied private cause of action

challenge in interpreting civil RICO is to achieve a construction that rests upon the language of the statute, while providing a measure of prosecutorial restraint similar to that which operates in public enforcement.[131] If civil RICO is to serve the "public interest" that Congress envisioned, private enforcement efforts need to be directed to those cases that the public enforcement agency would choose to prosecute if it had sufficient resources. Only then will RICO's treble damages incentives properly be enlisted to aid in deterring racketeering.

As discussed above,[132] the prior criminal conviction requirement does not accomplish the legislative objective of the private attorney general concept. Courts should look for other limitations that would prove less damaging to the private attorney general concept, yet would provide the necessary direction for bringing private actions. The most successful limitation to date is the racketeering injury requirement.[133]

The *Sedima* court adopted the racketeering injury requirement as its alternative holding. It observed that the requirement, which other courts have endorsed, derives support from RICO's statutory language as well as from RICO's bond with the Clayton Act.[134] The court argued that the requirement is consistent with the enacting legislature's intent that RICO provide additional remedies to fight organized crime, not merely provide remedies for already compensable injuries.

In a decision issued the day after the *Sedima* opinion, the Second Circuit in *Bankers Trust v. Rhoades Co.*[135] continued to read RICO narrowly by

---

for securities fraud. The Court's holding in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), signalled the end of the era of expansive construction of Rule 10b-5 adopted by lower federal courts. This narrowing has been continued in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (with regard to scienter); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (with regard to deception); Chiarella v. United States, 445 U.S. 222 (1980) (with regard to duty to disclose); and Dirks v. SEC, 103 S. Ct. 3255 (1983) (further limits on disclosure duty).

131. *See supra* note 42.

132. *See supra* notes 121–26 and accompanying text.

133. *See supra* notes 47–54, and accompanying text for discussion of racketeering injury. Conversely, the limitation of ties to organized crime, *see supra* note 46, has been too thoroughly discredited to offer potential for limiting civil RICO suits.

An alternative approach is to impose a heightened burden of proof. *See* discussion *supra* note 95; *see also* Strafer, Massumi & Skolnick, *supra* note 4, at 717–18 (heightened standard offers the only principled means of limiting civil RICO; clear and convincing standard would be "consistent with both RICO's legislative history and the traditional judicial power to determine the burden of proof"). Knowledge of the stricter burden might deter a number of the less appropriate suits now being brought. This alternative, however, does not explicitly provide direction to courts for narrowing suits to those detecting and enforcing a particular type of activity. Civil RICO actions might still be initiated that extend the statute's application beyond the scope of conduct targeted by the enacting legislature.

134. *Sedima*, 741 F.2d at 494.

135. 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657).

again requiring that a plaintiff allege a racketeering injury.[136] In light of its conclusion, the *Bankers Trust* panel indicated it need not reach *Sedima's* alternative ground of requiring a prior criminal conviction.[137] The court's conclusion perhaps indicates a preference for the racketeering injury requirement. The court proposed examples of injuries that would satisfy the requirement,[138] in an apparent attempt to counter criticism that the requirement is ill-defined.[139]

Commentators who advocate the racketeering injury requirement reason that it helps to direct attention to the factor that distinguishes organized crime from regular crime—the extra wrong of organization itself.[140] Under the racketeering injury analysis, RICO's proper target is thus not the individual crimes listed in section 1961, but rather the threat of violations of section 1962, that is, the investment, acquisition, maintenance of control or participation in an enterprise. Such threats exist apart from those posed by the particular acts of racketeering. These commentators therefore urge judges to carefully scrutinize RICO claims for an enterprise (section 1962) injury.[141]

Some courts fear, however, that the requirement unduly restricts the private plaintiffs' cause of action.[142] For example, in what is probably the most comprehensive review to date of the racketeering injury requirement, the Seventh Circuit in *Haroco, Inc. v. American National Bank and Trust*

136. The *Bankers Trust* panel described this as a "but-for" test, where each element of the violation must be a cause of the injury. *Id.* at 517. *But see* Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984) (criticizing the requirement of a racketeering enterprise injury imposed by *Sedima* and *Bankers Trust*).

137. 741 F.2d at 516 n.5.

138. *Id.* at 517. For example, if a person is denied fire insurance because of multiple arson acts caused by an enterprise, and the person's property subsequently suffers innocent fire damage, his monetary loss would be the result of the pattern of predicate acts of the enterprise. Or, a plaintiff might be forced to incur an unwanted business partner because the enterprise has jeopardized his business by feloniously causing customers to withhold their custom. In these instances, "the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern of racketeering acts." *Id.*

139. Other courts have noted the difficulty in interpreting and applying the racketeering injury requirement. *See, e.g.*, Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 413 (8th Cir. 1984) (calling it "a slippery concept whose definition has eluded even those courts professing to recognize it"); *In re* Catanella, 583 F. Supp. 1388, 1437 (E.D. Pa. 1984) (courts requiring it "have not defined the parameters of this concept and it borders on impossible to apply that which defies definition"); *see also* Note, *supra* note 31, at 110 (calling the examples given by courts and commentators "tenuous").

140. *See* Bridges, *supra* note 43, at 70.

141. *Id.* at 71 ("Courts should have no difficulty in requiring a distinct section 1962 injury rather than turning to section 1961(1) to find grounds for section 1964(c) damages.").

142. *See, e.g.*, Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822) (this restriction "reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts").

Co.[143] observed that *Sedima's* racketeering injury requirement appears to revive the discredited organized crime nexus,[144] and also blends elements of competitive injury and indirect injury, concepts that the Seventh Circuit rejected in earlier decisions.[145] In refusing to adopt a racketeering injury requirement, the Seventh Circuit concluded that the statute was deliberately and extraordinarily broad, indicating Congress's desire for breadth over precision.[146]

Critics of the racketeering injury requirement also argue that reliance on the antitrust analogy is inappropriate in view of the different purposes of the antitrust and racketeering laws.[147] Antitrust, they argue, is a preservative statute. The policy of restricting the recovery of private antitrust plaintiffs prevents eliminating defendants from the marketplace, reducing competition, and thus defeating the very objectives of the statute itself. In contrast, RICO is described as a purgative statute. Its function is not to promote market efficiency, but to ruin racketeers economically—to purge society of organized crime groups by depriving them of their assets.[148] Thus, these critics argue, it is improper to impose antitrust cause of action limitations in the civil RICO context.

The controversy over the correct interpretation of civil RICO's cause of action invites legislative resolution.[149] Nonetheless, the racketeering injury requirement appears to offer more promise for fulfilling congressional

143. 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822).

144. *Id.* at 394 (referring to the *Sedima* court's use of the term "mobsters" and its repeated references to organized criminal groups). The *Sedima* Respondent rebuts this implication, since the *Sedima* court only used the term "mobster" once. Brief for Respondent in Opposition to the Petition for a Writ of Certiorari at 5–6, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648).

145. *Haroco*, 747 F.2d at 395 (referring to the *Sedima* court's use of the phrase "systemic harm to competition and the market," and the implication of limiting recovery to indirect victims).

The *Bankers Trust* examples, *supra* note 138, could indeed be viewed as allowing a RICO cause of action only for indirect injuries. This indirect injury requirement was criticized by the Seventh Circuit in *Haroco*, 747 F.2d at 397–98, as well as by the *Bankers Trust* dissent, 741 F.2d at 522 (Cardamone, J., dissenting). The *Sedima* Respondent in its brief to the Supreme Court, however, suggested that "the direct/indirect analysis is erroneous, and undermines a proper analysis of Civil RICO." Brief for Respondent, *supra* note 144, at 6–7.

146. *Haroco*, 747 F.2d at 398–99.

147. *See, e.g.*, Strafer, Massumi & Skolnick, *supra* note 4, at 694–95; Note, *supra* note 104, at 1113.

148. *See supra* note 125.

149. Congress should seriously question whether the civil cause of action is an effective tool for controlling organized crime. *See* Comment, *supra* note 31, at 497 (concluding that Congress should abolish § 1964(c)); Note, *supra* note 104, at 1119.

The American Bar Association has endorsed a series of recommended congressional changes that would restrict the statute's use in criminal and civil actions. *See* ABA REPORT, *supra* note 43.

intent than the prior criminal conviction requirement. Adopting the racketeering injury requirement would allow lower courts to develop a body of case law that would move from an intuitive response[150] to a more reasoned analysis.[151] While the statute and its history do not compel courts to apply a racketeering injury requirement, the "by reason of" language and supporting antitrust analogy provide a firmer toehold for limiting the statute than that provided by the prior criminal conviction requirement.[152] Furthermore, the racketeering injury requirement does not prove as damaging to the private attorney general concept. By redirecting suits to focus on enterprise violations and not just individual crimes, this requirement for "something more" may most closely approximate the public's interest in combatting organized crime.[153]

V. CONCLUSION

"To cast a net sufficiently wide to catch organized criminals, Congress took the calculated risk that others, whose activities are chargeable as crimes under other federal or state laws, would also be netted."[154] The Second Circuit's prior criminal conviction requirement establishes a cause of action so narrow that it risks netting no one. Thus it denies relief where it might be appropriate. In practice, the prior criminal conviction requirement succeeds too well as a restriction of private suits—far surpassing perhaps even the Second Circuit's desire to curb civil RICO suits.

By incorporating a private attorney general concept in RICO, Congress sought to achieve the promise of private enforcement supplementing public efforts against organized crime. With unfettered application of the broadly-drafted civil RICO provisions, this promise remains unfulfilled. Courts, in redirecting the private attorney general concept to more closely adhere to

150. The court in *Catenella* observed that "many courts appear to treat RICO in general and the racketeer enterprise injury in particular, with the same analysis employed in the obscenity area—they know it when they see it!" 583 F. Supp. at 1437 n.9. The court cited two courts that used this in order to explain their view of RICO, Willamette Sav. & Loan v. Blake & Neal Finance Co., 577 F. Supp. 1415, 1430 (D. Ore. 1984); Waste Recovery Corp. v. Mahler, 566 F. Supp. 1466, 1468 (S.D.N.Y. 1983).

151. In the context of criminal RICO, one author hypothesized that if lower courts do not impose limitations themselves, "the end result may be that the Supreme Court will strike down major portions of RICO as unconstitutional, thus thwarting the operation of the statute entirely." Bradley, *supra* note 130, at 892–93.

152. Courts have observed that since the virtual identity of relevant language between civil RICO and antitrust is neither accidental nor meaningless, the analogy offers "the most logical point of departure in fashioning a well-reasoned construction of § 1964(c)." Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982).

153. Matz, *supra* note 92, at 25, col. 1 (to emphasize the difference between the effects of predicate crimes and the elements of a RICO cause of action undermines the argument "that a civil RICO proceeding is tantamount to a criminal prosecution"); *see supra* note 90 and accompanying text.

154. *Sedima*, 741 F.2d at 510 (Cardamone, J., dissenting).

the legislature's purpose, should seek alternatives to the prior criminal conviction requirement.

Diana K. Carey